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R.A. FRAME v. CONSOLIDATION COAL

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RICHARD A. FRAME,
COMPLAINANT

v.

DISCRIMINATION PROCEEDING

Docket No. PENN 85-112-D

CONSOLIDATION COAL COMPANY,
RESPONDENT

MSHA Case No. PITT CD 85-1

Appearances: Russell I. Jenkins, Esq., Uniontown, Pennsylvania,
for Complainant;
Karl T. Skrypak, Esq., Consolidation Coal Corporation,
Pittsburgh, Pennsylvania, for Respondent.

DECISION

Before: Judge Melick

This case is before me upon the complaint of Richard A. Frame, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that he was discharged by the Consolidation Coal Company (Consol) on October 29, 1984, in violation of section 105(c)(1) of the Act.(FOOTNOTE.1)

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983),

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affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Frame asserts that he refused to comply with his supervisor's work order to move a power cable for the roof bolting machine because of what he perceived to be a hazard of shock or electrocution. Since he was admittedly discharged in part because of that work refusal, Frame argues that his discharge was therefore based at least in part upon his exercise of an activity protected by the Act. A miners exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. *Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981).

Consol does not dispute that Mr. Frame was discharged in part because of his refusal to carry out the noted work order but argues that the directed work was not in fact hazardous and that Mr. Frame did not entertain a good faith, reasonable belief that to perform the work would have been hazardous. A question also exists as to whether Mr. Frame properly notified his supervisor of the reasons for his work refusal in accordance with the Commission decision in *Secretary ex rel Dunmire and Estle v. Northern Coal Company*, 4 FMSHRC 126 (1982).

On October 29, 1984, Richard Frame was assigned to work on the midnight shift under Section Foreman Kirby Cunningham as a general inside laborer/bratticeman. Frame was directed to the tail track to help the roof bolters load supplies for the roof bolting machine. He was later seen helping to load the supplies onto the scoop. Cunningham saw Mr. Frame about 5 minutes later, at approximately 1:50 a.m., standing near a rib, conversing with another miner.

Cunningham then told Frame to help the roof bolters move the roof bolting machine and its cable, and to help load supplies onto the machine. Frame did not respond but walked toward the roof bolting machine. Cunningham left at this point and went to the belt area to check on the feeder. When he later returned he saw a fluorescent light where the roof bolter had been located indicating to him that the machine had not yet been moved. He saw one of the roof bolters start to tram the scoop and the other roof bolter start to tram the roof bolter. Meanwhile, according to Cunningham, Frame was just standing against a rib. Indeed Frame admits that he was just standing around waiting to see what was happening. Cunningham then asked Frame why he was not helping to move the cable for the bolting machine. He told Frame that they

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needed help moving the machine cable that was hung across the entries.

According to Cunningham, Frame responded that he was sent to the section as a Bratticeman, that he only hangs tubing and that he does not touch energized cable. Cunningham again told Frame that he wanted him to help move the cable and told him to do what he was told. Frame repeated that he did not handle energized cable and told Cunningham to call him a jeep. According to Cunningham he then asked whether Frame did not want to work. Frame purportedly responded "call me a jeep Mother Fucker, I don't handle energized cable." Cunningham then told Frame that refusing to work and using abusive, profane language was a dischargeable offense. Frame responded "call me a jeep, I'm sick, can't you hear?" Cunningham then told Frame that his time would be stopped because he failed to perform the work he had been directed to perform and because he used abusive, and obscene language.

Frame did not appear to Cunningham to be sick at this time, did not say what was wrong with him other than high blood pressure and declined to see a doctor. Frame was given another chance to return to work but just laughed and said nothing. He then boarded a jeep and was taken out of the mine. His work time was stopped at approximately 2:05 a.m.

According to Frame he went up to the face after loading supplies for the roof bolters, just as he had been told, and was standing around when Foreman Cunningham came up to him. Cunningham then told him that he was to help the roof bolters load supplies and help with the cable. According to Frame he then responded that he was afraid to handle wet energized cable and at this point Cunningham "blew up", started yelling and stated over and over "do you know what you just did?" Frame alleges that because of Cunningham's reaction he did not have a chance to explain why he was afraid to handle energized cable. He explained at hearing that he was afraid to handle energized cable because he had been shocked by a cable the week before and wanted to have rubber gloves before handling it. He does not dispute that rubber gloves were available on the section and that Cunningham himself had a pair on him at the time. Frame alleges however that he did not have a chance to ask for the gloves.

Mr. Frame readily concedes that it would not have been hazardous for him to have moved the subject cable with rubber gloves. He further concedes that he did not request such gloves from Cunningham or indicate in any way that the reason for his work refusal was his not having such gloves. It is not disputed, moreover, that Cunningham then had on his

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person a pair of rubber gloves, that other rubber gloves were also available on the section at the time and that had Frame requested such gloves, they would have been made available.

Frame's contention that he did not request rubber gloves because Cunningham gave him no time to make such a request is not credible.(FOOTNOTE.2) Frame himself testified that the verbal exchange between he and Cunningham continued for some period of time and that he did not actually leave the mine until some time later. Indeed he complained that Cunningham actually delayed the arrival of the jeep to take him out of the mine.

Under the circumstances I cannot find that the designated work assignment was hazardous. At no time was Mr. Frame denied the use of rubber gloves which even he concedes would have eliminated any hazard associated with the task. Mr. Frame's failure to have requested rubber gloves also demonstrates clearly that he did not act in good faith in his work refusal. Accordingly the charges of discriminatory discharge must be denied and this case dismissed.(FOOTNOTE.3)

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 Section 105(c)(1) of the Act provides in part as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has failed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

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2 Frame's credibility is further eroded by the testimony of his own witness, Stanley Stockdale, who heard Frame direct profanity toward Foreman Cunningham. Frame had denied using such language.

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3 These findings are made completely independent of the decision of arbitrator Ralph E. Pelhan on November 26, 1984, and of the determination of ineligibility for unemployment insurance benefits by the Pennsylvania Department of Labor and Industry on

November 26, 1984 (and subsequent decisions reviewing that determination). Adequate records of those proceedings were not made available to the undersigned who therefore was unable to fully evaluate those proceedings in accordance with the guidelines set forth in Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).